

ONG XIN TONG v. PENDAFTAR BESAR KELAHIRAN DAN
KEMATIAN MALAYSIA & ANOR

HIGH COURT MALAYA, IPOH
ABDUL WAHAB MOHAMED J

[ORIGINATING SUMMONS NO: AA-34-3-12-2019]
1 DECEMBER 2021

Abstract – *In an application for citizenship by operation of law pursuant to art. 14(1)(b) of the Federal Constitution (FC), the failure to exhaust the alternative method of application by registration under art. 15A of the FC is not fatal to the application. Nowhere is it stated in the FC that an application under art. 15A must be sought first or is a pre-condition to an application to the court under art. 14. The paths to citizenship under art. 14 and art. 15A of the FC are distinct and neither is subservient nor secondary to the other.*

CONSTITUTIONAL LAW: *Citizenship – Application for – Applicant born to Malaysian father and mother of People’s Republic of China national after Malaysia Day – Parents not legally married to each other at time of applicant’s birth – Birth certificate stated applicant non-citizen or ‘Bukan Warganegara’ – Applicant’s parents registered marriage three months after her birth – High Court declared applicant legitimate child of her parents and official DNA report confirmed they were her biological father and mother – Whether applicant satisfied qualifications for citizenship by operation of law – Whether court could deliberate on whether decision of National Registry Department justiciable – Whether applicant could apply for originating summons while application to Home Minister still pending – Federal Constitution, arts. 14(1)(b) & 15A*

This was an application by the applicant plaintiff *vide* originating summons (‘OS’), seeking to be declared a citizen of Malaysia under art. 14(1)(b) of the Federal Constitution (‘FC’), read together with Part II, s. 1(a) and (e) of the Second Schedule of the FC. The Registrar of the National Registry Department and the Government of Malaysia (‘respondents’) objected to the applicant’s application. The applicant was a female child born on 24 June 2016 in a hospital in Ipoh, Perak to a Malaysian father and a mother of People’s Republic of China national. The applicant’s parents were not legally married to each other at the time of her birth and her birth certificate stated that she was a non-citizen or ‘Bukan Warganegara’. The applicant did not possess a passport issued by Malaysia, the People’s Republic of China or any other country and had never left Malaysia since the time she was born. Three months after the applicant’s birth, her parents registered their marriage. The High Court had declared that the applicant was the legitimate child of her parents and an official DNA report had even confirmed that they were her biological father and mother. Prior to this application, the applicant’s father

- A had applied to the Home Minister, under art. 15A of the FC, but to date there was no response. The grounds of the applicant's application were that she was born in Malaysia after Malaysia Day and her father was Malaysian. The respondents, however, argued that as the applicant's parents were not married at the time of her birth, she was thus illegitimate and therefore,
- B Part III, s. 17 of the Second Schedule of the FC would carry effect in which the applicant could only follow her mother's nationality which was that of the People's Republic of China. The respondents also rejected the assertion that the applicant was 'stateless'. The respondents further raised preliminary objections and raised the following questions: (i) whether the court could deliberate on whether the decision of National Registry Department was
- C justiciable and if justiciable, whether the decision of *CTEB & Anor v. Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* ('CTEB') rendered this application bound to be dismissed; and (ii) whether the applicant could apply for this OS when the father's application under art. 15A of the FC to the Home Minister was still pending.
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Held (allowing application):

- (1) There was no prohibition to restrict this court from hearing the applicant's present application as the OS was not a review of the respondent's decision not to grant citizenship under art. 15A of the FC.
- E Instead, this application required a determination of the manner of interpretation of the FC to the facts of a case, a consideration of proportionality to best serve the intent of the FC and the manner or result in which the respondents applied the law based on the FC. The application under art. 14(1)(b) of the FC was justiciable and the reasons
- F in which the respondents refused citizenship to the applicant must be examined thoroughly in the interest of justice and constitutional proportionality. (paras 16 & 19)
- (2) The question arose as to whether the majority decision in *CTEB* meant that this application was 'non-justiciable' to the extent that the FC had
- G already held that an illegitimate child must follow the nationality of the mother. Each application for citizenship is fact-sensitive and must be treated based on its own peculiar set of facts. Furthermore, the fact of the present case may be distinguished from the facts of the case in *CTEB*. The factual matrix of this case and *CTEB* were also different. The
- H decision in *CTEB*, whilst good law, was not directly applicable to this case. (paras 20, 21 & 23)
- (3) The need to exhaust all alternate remedies is not an absolute bar to an applicant seeking redress of the court, especially in matters concerning constitutional liberties. The application was made to the Home Minister
- I in 2017. However, there has been no response whatsoever, be it in rejection, approval or even a request for more information from the

Minister for the past four years. Discretion must always be exercised judiciously and the applicant and her parents could not be judiciously expected to continue holding their breath for the esteemed Minister's decision to the art. 15A application. In any event, nowhere is it stated in the FC or in Part III of the Second Schedule of the FC that an application under art. 15A of the FC must be sought first or is a pre-condition to an application to this court. The path to citizenship under arts. 14 and 15A of the FC are distinct and neither is one subservient or secondary to the other. (paras 26, 28 & 30)

- (4) It was undisputed that the applicant was born in Malaysia after Malaysia Day, the first condition under art. 14(1)(b) had thus been duly satisfied by the applicant. On the face of the qualification under Part II, s. 1(a) of the Second Schedule of the FC, the applicant had also satisfied this criterion considering that the applicant was a person born within the Federation of whose parents, one of at least, being the father, was a Malaysian citizen at the time of her birth. This was supported by the High Court decision where the applicant was declared as the legitimate child of her father, a Malaysian. The official DNA report further strengthened the applicant's case that her parents were her biological father and mother. (paras 41, 43 & 46)
- (5) The consideration point of s. 1(e) criteria is 'not born a citizen of any country', meaning the applicant must first have already attained the citizenship of another country at birth before the applicant could be entitled to qualify under s. 1(e). The FC had provided a deeming provision in s. 2(3) which says that for a period of one year after the person's birth, any citizenship that person acquires would be the deemed citizenship at birth. The applicant was stateless because she had no other citizenship apart from her classification as 'Bukan Warganegara' in her birth certificate. Furthermore, she had no other citizenship of any other country after one year of her birth and would automatically be entitled to citizenship by operation of law. (paras 51-54)
- (6) The applicant had satisfied the qualification of Part II, s. 1(e) and ought to be entitled automatically by operation of law to be a Malaysian citizen. As in the case of the qualification under Part II, s. 1(a), since the applicant had satisfied the first criteria of art. 14(1)(b) of the FC, a satisfaction of either one or both of the criteria in s. 1(a) or 1(e) would enable her to attain citizenship. (para 55)

Case(s) referred to:

Alma Nudo Atenza v. PP & Another Appeal [2019] 5 CLJ 780 FC (*refd*)

CTEB & Anor v. Ketua Pengarah Pendaftaran Negara, Malaysia & Ors [2021] 6 CLJ 471 FC (*dist*)

Dato' Seri Ir Hj Mohammad Nizar Jamaluddin v. Dato' Seri Dr Zambry Abdul Kadir; Attorney General (Intervener) [2010] 2 CLJ 925 FC (*refd*)

- A** *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145 FC (*refd*)
Lim Wan Feng v. Lim Kiew Poh & Ors [2020] 1 LNS 2370 HC (*refd*)
Madhuvita Janjara Augustin (Suing Through Next Friend, Margaret Louisa Tan) v. Augustin Lourdsamy & Ors [2018] 4 CLJ 758 CA (*refd*)
Pendaftar Besar Kelahiran Dan Kematian, Malaysia v. Pang Wee See & Anor [2017] 7 CLJ 33 CA (*refd*)
- B** *PHAM v. Secretary Of State For The Home Department* [2015] 3 All ER 1015 (*refd*)
Robin Tan Pang Heng v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor [2010] 9 CLJ 505 FC (*refd*)
Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC (*refd*)
- C** *Sivarama Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507 FC (*refd*)
Tebin Mostapa v. Hulba-Danyal Balia & Anor [2020] 7 CLJ 561 FC (*refd*)
The Speaker Of Dewan Undangan Negeri Of Sarawak Datuk Amar Mohamad Asfia Awang Nassar v. Ting Tiong Choon & Ors And Other Appeals [2020] 3 CLJ 757 FC (*refd*)
- D** **Legislation referred to:**
 Citizenship Rules 1964, r. 12
 Federal Constitution, arts. 8, 14(1)(b), 15A, Second Schedule, Part II s. 1(a), (b), (e), Part III ss. 2, 17
Reported by Lina E

E **JUDGMENT**

Abdul Wahab Mohamed J:

Introduction

- F** **[1]** This is an application by the plaintiffs *vide* originating summons in No. AA-34-3-12-2019 dated 20 December 2019 seeking for, *inter alia*, the following reliefs:
- G** (a) Bahawa Ketua Pendaftar Kelahiran dan Kematian Malaysia mendaftarkan semula taraf kewarganegaraan Ong Xin Tong sebagai warganegara Malaysia;
- (b) Bahawa Ketua Pendaftar Kelahiran dan Kematian Malaysia mendaftarkan semula kelahiran Ong Xin Tong sebagai orang yang sah taraf dan menamakan Ong Chin Hock (No. K/P: 830205-08-5179) sebagai bapa biologikal (biological father) dan Luo Zhijuan (Pasport China:E49846399) sebagai ibu biologikal (biological mother).
- H** **[2]** The plaintiff essentially seeks to be declared a citizen of Malaysia under art. 14(1)(b) of the Federal Constitution. The respondents, the Registrar of the National Registry Department and the Government of Malaysia, objects to the plaintiff's application. In doing so, parties filed the following cause papers:
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- (i) Saman pemula dated 20 December 2019. A
- (ii) Affidavit sokongan plaintiff affirmed on 23 October 2019.
- (iii) Affidavit jawapan responden affirmed on 24 February 2020.
- (iv) Affidavit balasan kepada affidavit jawapan responden affirmed on 24 June 2020. B

[3] This application was first heard online over Zoom on 27 August 2021, and thereafter physically in person upon the request of parties on 10 September 2021. Both parties filed extensive submissions, reply submissions, additional submissions and skeletal speaking notes, of which I thank parties for their able submissions. I have read and considered both oral and written submissions of parties with a fine toothcomb and the following are my findings of this matter. C

Background Facts

[4] The plaintiff is a female child born on 24 June 2016 in KPJ Ipoh Specialist Hospital, Perak to a Malaysian father, Mr. Ong Chin Hock, and a mother of People's Republic of China national named Mdm. Luo Zhijuan. D

[5] The plaintiff's parents were not legally married to each other at the time of the plaintiff's birth. The birth certificate of the plaintiff states the plaintiff as a non-citizen or 'bukan warganegara'. E

[6] The plaintiff does not possess a passport and has never left Malaysia since the time she was born. There is no evidence before this court that the plaintiff holds a passport or citizenship of the People's Republic of China or any other country. Three months after the plaintiff's birth, the parents legally registered their marriage at Ibu Pejabat JPNM Putrajaya on 5 September 2016. F

[7] The High Court in Ipoh had on 4 September 2019 declared that the plaintiff is the legitimate child of the parents, Ong Chin Hock and Luo Zhijuan. The Chemist Department had through an official DNA report dated 18 November 2019 confirmed that Ong Chin Hock and Luo Zhijuan are the biological father and mother of the plaintiff. G

[8] Prior to this application, the application for legitimacy and the DNA test, the plaintiff's father had made a written application to the Home Minister under art. 15A of the Federal Constitution on 9 August 2017. There has however been no response, rejection, approval or otherwise, from the esteemed Minister until today. H

[9] The plaintiff moves this court under art. 14(1)(b) of the Federal Constitution, read together with Part II, s. 1(a) and (e) of the Second Schedule, that she be declared a Malaysian citizen by operation of law on the following grounds: I

- A (i) that she is born in Malaysia after Malaysia Day; and
(ii) that her father is a Malaysian.

[10] The respondents, the National Registry Department and the Government of Malaysia, objects to the plaintiff's application on the ground that as the plaintiff's parents were not married at the time of her birth, she is thus illegitimate and therefore Part III, s. 17 of the Second Schedule of the Constitution will carry effect in which the plaintiff can only follow her mother's nationality which is that of the People's Republic of China. The respondents also reject the assertion that the plaintiff is 'stateless'.

C **Issues For Determination**

[11] The main issue which arises for this court's determination is whether the plaintiff has satisfied the qualifications for citizenship, by operation of law, as set out in the Federal Constitution.

- D [12] However, I observe that there are preliminary issues raised by the respondents in the present case which requires this court's prior determination before moving on to the main issue in question as follows:

- (i) whether this court can deliberate on whether the decision of JPN is justiciable. And if justiciable, whether the decision of *CTEB & Anor v. Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2021] 6 CLJ 471 renders this application bound to be dismissed ("issue of justiciability"); and
(ii) whether the child can apply for this originating summons when the father's application under art. 15A Federal Constitution, to the Home Minister is still pending ("issue of alternative remedy").

Issue Of Justiciability

[13] This is a threshold issue being that whether the respondents' refusal to recognise the plaintiff's citizenship is justiciable or not, before this court. In s. 2 of Part III of the Second Schedule, it is stated that, 'A decision of the Federal Government under Part III of this Constitution shall not be subject to appeal or review in any court'.

[14] The respondents' decision to deny citizenship of the plaintiff due to the Government's interpretation of Part III, s. 17 of the Second Schedule may be strictly speaking, non-justiciable by operation of s. 2 of the same Part. Meaning, this court would not or should not have the duty to subject the respondents' decision to a review.

[15] On the principle of justiciability, the Court of Appeal had in the case of *Madhuvita Janjara Augustin (Suing Through Next Friend, Margaret Louisa Tan) v. Augustin Lourdsamy & Ors* [2018] 4 CLJ 758 held as follows:

[26] We start with a few preliminary issues; first of which is the issue of justiciability of the matter, the argument being that a decision under Part III of the Federal Constitution is non-justiciable. Section 2 of Part III of the Second Schedule reads:

A decision of the Federal Government under Part III of this Constitution shall not be subject to appeal or review in any Court.

[27] Section 2 above stands as an ouster clause. Parliament, in all its wisdom has seen it fit that decisions of the federal government under Part III of the Federal Constitution are not to be subject to appeal or review in any court. Now, as an ouster clause, and that will include such a clause sited in the Federal Constitution, which serves to limit and oust the jurisdiction of the court, s. 2 must be read strictly. This is because the courts guard its jurisdiction and powers responsibly and for many more good reasons which do not require examination or expansion for the present purposes.

[28] It is quite clear from the carefully worded terms of s. 2 that the scrutiny of the court is only excluded where it concerns a decision of the federal government made under Part III of the Federal Constitution. It is apparent from the records of appeal that the court was not moved to hear an appeal or review of any decision made by the federal government under Part III, and that includes the federal government's rejection of the appellant's application for citizenship under art. 15A. That decision of the federal government is not under challenge. In fact, no decision of the federal government is in the facts of the present appeal. It is further clear from the cause papers and submissions before us that the decision of the federal government under art 15A in respect of the appellant remains with the executive government.

[29] But, that is not to say that the court may not refer to that decision in the course of its deliberations on the appellant's application. Neither can it be right nor may it be suggested to be the intention of Parliament as set out in s. 2 above, that the court cannot make any pronouncements on citizenship under Part III of the Federal Constitution. Matters concerning citizenship, as are a whole host of other subject matters found in the Federal Constitution are within the purview of the courts. It is only the decisions of the federal government under Part III that are not open to appeal or review in any court.

[30] In the originating summons filed by the appellant, the appellant sets out her prevailing facts and conditions before she invites the court to make certain declaratory orders on her status in respect of her claim for citizenship. When considering such an application, the court is far from sitting on appeal or review, let alone appeal or review of a decision already made by the federal government under Part III of the Federal Constitution. We, therefore, do not agree with the learned judge in this regard.

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A [31] We observed that the learned judge agreed with the submissions of the learned SFC that the matter before her is non-justiciable. Before leaving this first issue, we must correct the use of the term, ‘non-justiciable’.

B [32] The presence of an ouster clause of some degree or extent in its application found in s. 2 of Part III of the Second Schedule is to our minds, not the same as saying that the matter is non-justiciable. Although the decisions in *Ku Luwante (an infant) v. Government of Malaysia & Anor* [1978] 1 MLJ 92; *Andrew s/o Thamboosamy v. Superintendent of Pudu Prisons, Kuala Lumpur* [1976] 2 MLJ 156; and *In Re Meenal w/o Muniyandi* [1980] 2 MLJ 299 have been cited in support of this proposition, a careful reading of the same does not hold true. What those cases, in fact, say is that ‘the laws on citizenship and immigration rest solely on questions of public policy’; that ‘Under the Immigration Ordinance, only the Executive has power to release the appellant. Whether or not the Executive should do so is a matter of policy for them, they have information and sources of information not available to the court and are moved by political, economic, social and cultural considerations which the court is not well equipped to apply, and judges should be slow to embarrass them into any course of action’. None of the cases cited equated the existence of ouster clauses, or matters concerning citizenship or immigration as ‘non-justiciable’. The courts merely alluded to the fact that the court should be slow to enter into these areas for the subject matters of immigration and citizenship are often fraught with policy, political and administrative considerations. An example of a non-justiciable matter would be clemency or pardon where such matters are within the prerogative of the Ruler of the realm and where mercy begins. A quick thumb through the law journals will readily yield results showing many challenges taken on immigration and citizenship matters. The success or otherwise of these challenges have not been for reasons of non-justiciability.

G [16] Based on the above authority, it is in my considered opinion, that there is no prohibition to restrict this court from hearing the plaintiff’s present application as the originating summons is not a review of the respondents’ decision not to grant citizenship under art. 15A Federal Constitution. Instead, this application requires a determination of the manner of interpretation of the Federal Constitution to the facts of the case, a consideration of proportionality to best serve the intent of the Constitution and the manner or result in which the respondents applied the law based on the Constitution.

H [17] This is fully justiciable before this court and under the now settled basic structure doctrine as held by the Federal Court in *Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780 and also seen in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507, *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561 (FC) and *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145; [2018] 1 MLJ 545 (FC).

[18] Richard Malanjum, CJ in *Alma Nudo Atenza (supra)* had this to say about the basic structure doctrine: A

[72] This court has, on several occasions, recognised that the principle of separation of powers, and the power of the ordinary courts to review the legality of State action, are sacrosanct and form part of the basic structure of the FC. (See: *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561 at para. [90], *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145; [2018] 1 MLJ 545 at paras. [48], [90]). B

[73] In fact, courts can prevent Parliament from destroying the “basic structure” of the FC. (See: *Sivarasa Rasiah (supra)* at para. [20]). And while the FC does not specifically explicate the doctrine of basic structure, *what the doctrine signifies is that a parliamentary enactment is open to scrutiny not only for clear-cut violation of the FC but also for violation of the doctrines or principles that constitute the constitutional foundation.* C

[74] The role of the Judiciary is intrinsic to this constitutional order. Whether an enacted law is constitutionally valid is always for the courts to adjudicate and not for Parliament to decide. As rightly stated by Professor Sir William Wade (quoted by this court in *Indira Gandhi* at para. [35]): D

... it is always for the courts, in the last resort, to say what is a valid Act of Parliament; and that the decision of this question is not determined by any rule of law which can be laid down or altered by any authority outside the courts. (emphasis added) E

[19] It is thus in my considered view that the application under art. 14(1)(b) Federal Constitution is justiciable and the reasons in which the respondents refuse citizenship to the plaintiff must be examined thoroughly in the interest of justice and constitutional proportionality. F

[20] The question then arises as to whether the majority decision in *CTEB* means that the application before me is ‘non-justiciable’ to the extent that the Federal Court had already held that an illegitimate child must follow the nationality of the mother. I find that each application for citizenship is fact-sensitive and must be treated based on its own peculiar set of facts. G

[21] Furthermore, the facts of the present case may be distinguished from the facts of the case in *CTEB*. The application in *CTEB* is made under qualification Part II, s. 1(b) of the Second Schedule, whereas this application is under the qualifications of s. 1(a) and 1(e) respectively. Further, both counsels for the parties had agreed that the factual matrix of this case and *CTEB* are also different. H

[22] Crucially of comparison is that the child in the case of *CTEB* was born in the Philippines, hold a passport issued by the Government of Philippines and is presumed a citizen of the Philippines. Whereas, the plaintiff was born in Malaysia, holds no passport and has no other citizenship anywhere else, presumed or otherwise. I

- A [23] I therefore find that the decision and conclusion in the case of *CTEB*, whilst good law, is not directly applicable to this case. This does not mean that the respective *ratio decidendi* of the Federal Court in *CTEB* need not be followed or observed by this court. This means that each fact of this case and its application of the Constitutional provisions, must be considered in its own light whilst being guided by the several findings and approaches of the majority in *CTEB*.
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Issue Of Alternative Remedy

- C [24] This court shall now proceed to consider the respondents' preliminary contention that the plaintiff is restricted from seeking redress of this court as her father's application under art. 15A Federal Constitution is still pending. In other words, the respondents claimed that this application is premature.

[25] It was the respondents' contention that:

- D (i) the plaintiff, through her father, had made the application on 9 August 2017 and ought to wait for a decision of the Minister before filing this application;
- E (ii) the Minister must take time to meticulously go through the application and consider each point in the r. 12 Citizenship Rules 1964 'checklist'; and
- (iii) the Court of Appeal authority of *Pendaftar Besar Kelahiran Dan Kematian, Malaysia v. Pang Wee See & Anor* [2017] 7 CLJ 33; [2017] 3 MLJ 308 is applicable where it was decided by Abang Iskandar JCA (as His Lordship then was) that:

- F [42] In this case, the respondent could still apply to be a citizen by applying an invocation of art. 15A of the Federal Constitution, namely application for citizenship by way of registration for consideration by the Minister. We noted too that he had written to respondent on that avenue but that the request was turned away without it being considered by the honourable Minister. That would mean that his request had not been subject to the honourable Minister's consideration. In other words, he had not exhausted his available avenue for redress. That avenue is still available for him to explore.
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- H (iv) the plaintiff must first exhaust all available legal remedies before seeking redress of this court.

- I [26] This court cannot agree with the submissions of the respondents as the need to exhaust all alternate remedies is not an absolute bar to an applicant seeking redress of the court, especially in matters concerning constitutional liberties.

[27] The test to consider whether a failure to exhaust all alternative remedies is fatal is a discretionary one for the court to decide as held in *Robin Tan Pang Heng v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2010] 9 CLJ 505.

[28] In the present case, the application was made to the Minister in 2017. However, there has been no response whatsoever, be it a rejection, approval or even a request for more information from the Minister for the past four years. Discretion must always be exercised judiciously and I therefore cannot judiciously expect the plaintiff and her parents to continue holding their breath for the esteemed Minister's decision to the art. 15A application.

[29] I also note a decision of the High Court in the case of *Lim Wan Feng v. Lim Kiew Poh & Ors* [2020] 1 LNS 2370 which held that failure to exhaust the alternative method of an art. 15A application is not fatal to an application pursuant to art. 14(1)(b). Justice Leonard Shim had in his decision held as follows:

[22] Article 15A of the FC is a separate and distinct provision from Article 14(1)(b). An application for citizenship by registration under Article 15A of the FC falls under the purview of the Federal Government whereas citizenship under Article 14(1)(b) is a fundamental constitutional right accorded to a citizen or the offspring of a citizen born on or after Malaysia Day under the Federal Constitution by operation of law. As the Government have not made a decision on the Applicant's application under Article 15A despite several follow up letters from the Applicant, there is no decision made under Article 15A for the Applicant to appeal against or seek a review. This Court will not at this stage review the application under Article 15A. The application under Article 15A stem from the revocation of the Applicant's citizenship by the JPN and the Regional Registrar of Births and Deaths under the RBDO. As stated in my finding above, the revocation and deprivation of the Applicant's citizenship was done in breach of the mandatory requirement prescribed in Article 27 of the FC. The breach of Article 27 which gives the Applicant the right to be informed in writing of the grounds for deprivation of citizenship and the right to have the case referred to a committee of inquiry is tantamount to a breach of natural justice ...

[23] Further, matters concerning citizenship under the Federal Constitution are within the purview of the Courts and the Applicant has set out the material facts which entitles her to make this application for declaratory and/or other reliefs in respect of her claim for citizenship under Article 14(1)(b). **There is no express requirement that the Applicant must exhaust alternative remedies under Article 15A of the FC before making this application.** See *Madhuvita Janjara Augustin (Suing through next friend, Margaret Louisa Tan) v. Augustin Lourdsamy & Ors* [2018] 4 CLJ 758. From the peculiar facts and circumstances of this case, this Court finds that it is unnecessary for the Applicant to exhaust all remedies by applying under Article 15A before coming to Court. (emphasis added)

- A [30] In any event, nowhere is it stated in the Constitution or in Part III of the Second Schedule that an application under art. 15A must be sought first or is a pre-condition to an application to this court. The path to citizenship under art. 14 and art. 15A are distinct and neither is one subservient or secondary to the other. Even assuming the Minister had decided to reject the art. 15A application, there is no bar for the plaintiff to seek redress before this court.

- B [31] For the foregoing reasons above, this court is therefore of the considered view that the preliminary point raised by the respondents to be bereft of any merits and shall now proceed to consider the main issue in contention *ie*, whether the plaintiff had satisfied the qualifications for citizenship as required under the law.
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General Principles Of The Law

- D [32] Justice Rohana Yusof PCA in Her Ladyship's pronouncement in the majority decision in *CTEB* most succinctly stated the general law and considerations of citizenship as follows:

- E [13] The concept of citizenship law predated the formation of the Federation of Malaysia. It was there even before independence. Laws pertaining to citizenship in Malaysia then form part of the supreme law and no longer remain as ordinary law. These provisions too are entrenched in the FC in that, they are not easily amended as it requires the consent of the Conference of Rulers pursuant to art. 159(5) of the FC. Even with the Proclamation of Emergency under art. 150 as we are currently under, no emergency law may be passed which is inconsistent with provisions relating to citizenship (see art. 150(6A)).

- F [14] Taking into account the various political and social factors prevailing then, the framers of the FC had introduced four categories of citizenship together with the requisite qualifications stipulated in Part III of the FC ranging from arts. 14 to 22.

- G [15] There are four ways of acquiring Malaysian citizenship and they are by:

- H (i) operation of law (art. 14);
(ii) registration (arts. 15, 15A, 16, 16A and 18);
(iii) naturalisation (art. 19); or
(iv) incorporation of territory (art. 22).

- I [16] Of the four categories, the operation of law citizenship is almost automatic. One either fits the given criteria under the FC or one does not. The criteria are clearly stipulated in the FC and it does not require any exercise of discretion by the authority.

- [17] By operation of law, therefore entails a situation where at birth the person's status of citizenship will be so determined. It is a matter of birthright. This legal position is also as stated by Emeritus Professor Datuk

Dr. Shad Saleem Faruqi, in his book *'Our Constitution'* (Sweet & Maxwell, Thomson Reuters 2019) at pp. 178 and 179. In practical terms, a birth certificate will be issued right away upon registration of such birth. While the other three categories of citizenship by registration and naturalisation require an application to the authorities upon meeting the necessary conditions imposed under the FC (see Suffian *'An introduction to the Constitution of Malaysia'* (3rd edn, Pacifica Publications 2007) at pp. 330-337).

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[33] The applicable provisions in the Federal Constitution are reproduced herein for ease of reference as follows:

Part II: Fundamental Liberties

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Article 14: Citizenship By Operation Of Law

- (1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:
 - (a) every person born before Malaysia Day who is a citizen of the Federation by virtue of the provisions contained in Part I of the Second Schedule; and
 - (b) **every person born on or after Malaysia Day, and having any of the qualifications specified in Part II of the Second Schedule.**
 - (c) (Repealed).

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Second Schedule

Part II [Article 14(1)(b)]

1. Subject to the provisions of Part III of this Constitution, the *following persons* born on or after Malaysia Day are citizens by operation of law, that is to say:
 - (a) *every person born within the Federation of whose parents one at least is at time of the birth either a citizen or permanently resident in the Federation;* and
 - (b) every person born outside the Federation whose father is at the time of the birth a citizen and either was born in the Federation or is at the time of the birth in the service of the Federation or of a State; and
 - (c) every person born outside the Federation whose father is at the time of the birth a citizen and whose birth is, within one year of its occurrence or within such longer period as the Federal Government may in any particular case allow, registered at a consulate of the Federation or, if it occurs in Brunei or in a territory prescribed for this purpose by order of the Yang di-Pertuan Agong, registered with the Federal Government; and

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- A (d) every person born in Singapore of whose parents one at least is at the time of the birth a citizen and who is not born a citizen otherwise than by virtue of this paragraph; and
- (e) *every person born within the Federation who is not born a citizen of any country otherwise than by virtue of this paragraph.*
- B 2(1) A person is not a citizen by virtue of paragraph (a), (d) or (e) of section 1 if, at the time of his birth, his father, not being a citizen, possesses such immunity from suit and legal process as is accorded to an envoy of a sovereign power accredited to the Yang di-Pertuan Agong, or if his father is then an enemy alien and the birth occurs in a place under the occupation of the enemy.
- C (2) In section 1 the reference in paragraph (b) to a person having been born in the Federation includes his having been born before Malaysia Day in the territories comprised in the States of Sabah and Sarawak.
- D (3) *For the purposes of paragraph (e) of section 1 a person is to be treated as having at birth any citizenship which he acquires within one year afterwards by virtue of any provisions corresponding to paragraph (c) of that section or otherwise.*

Second Schedule

E **Part III [Article 31]**

Supplementary Provision Relating To Citizenship

Interpretation

- F 17. For the purposes of Part III of this Constitution references to a person's *father* or to his *parent*, or to *one of his parents*, are in relation to a person who is illegitimate to be construed as references to his mother, and accordingly section 19 of this Schedule shall not apply to such a person (emphasis added)

G [34] In the exercise of this court's function, I additionally remind myself that a right of citizenship is a fundamental right of fundamental importance as held in *PHAM v. Secretary Of State For The Home Department* [2015] 3 All ER 1015. In this country, the case of *The Speaker Of Dewan Undangan Negeri Of Sarawak Datuk Amar Mohamad Asfia Awang Nassar v. Ting Tiong Choon & Ors And Other Appeals* [2020] 3 CLJ 757, held that:

H The deprivation of citizenship is a severe form of action against a citizen for having acquired foreign citizenship and reflected how seriously the FC views the act.

I [35] Furthermore, it cannot be gainsaid that the common law concept of *jus soli* and *jus sanguinis* in respect of citizenship in Malaysia is of importance in reading the Constitution as it is today. These concepts are well stated in the case of *Pang Wee See (supra)* as follows:

[29] In determining citizenship of a person, two concepts are commonly applied, namely the concept of *jus soli* and the concept of *jus sanguinis*. *Jus soli* which means ‘right of the soil’, and commonly referred to as birth right citizenship, is the right of anyone born in the territory of a state to nationality or citizenship. The determining factor being the place or territory where a person was born. In the case of *jus sanguinis*, which in Latin means ‘right of blood’, is a principle of nationality law by which citizenship is not determined by place of birth but by having one or both parents who are citizens of the state. Viewed from the context of these two concepts, we are of the considered opinion that art. 14(1)(b) read with s. 1(a), Part II, Second Schedule of the Federal Constitution is a provision which is anchored on the elements of both the concepts of *jus sanguinis* and of *jus soli*, whereby citizenship of a person is traceable to the place of birth namely, Malaysia, as well as Malaysian citizenship of one of the person’s parents (the right of blood) at the time of the person’s birth, in order to be a Malaysian citizen by operation of law, under art. 14(1)(b) read with s. 1(a), Part II, Second Schedule of the Federal Constitution.

[36] Our learned Chief Justice, Tun Tengku Maimun Tuan Mat in the minority pronouncement in *CTEB* had this to say about *jus soli* and *jus sanguinis*:

[151] To reiterate the above passage, *jus soli* encapsulates the notion that a person is entitled to citizenship purely on the basis of the place where he is born irrespective of the citizenship status of his parents. Thus, if immigrant non-citizen parents from one country give birth to their child in a country which adopts the principle of only *jus soli*, the child is automatically a citizen of that country by the fact of his birth there. *Jus sanguinis* on the other hand looks only to the citizenship status of the parent irrespective of where the child was born. So long as the parent (sometimes the father only and other times either parent) is a citizen, the child is automatically entitled to ‘inherit’ the citizenship status of that parent. As observed by Abang Iskandar JCA in the above-quoted judgment, our FC amalgamates both *jus soli* and *jus sanguinis* into its provisions.

[152] Looking at the citizenship scheme and structure of the FC as a whole, it is my interpretation that the framers of the FC intended that the conferral of citizenship be crafted as widely as possible to enable all relevant persons at the time of the formation of Malaya and later Malaysia the right to be conferred citizenship by operation of law. There are several indicators of this.

[37] The general rules of interpretation, to which I am guided, in dealing with a case of Constitutional interpretation has also been consistently held by our courts as follows. In *Alma Nudo Atenza*:

It is well-established that “a constitution must be **interpreted in light of its historical and philosophical context, as well as its fundamental underlying principles**”.

...

A Hence, the provisions of the FC should be read harmoniously. Indeed the fundamental liberties provisions enshrined in Part II of the FC are parts of a majestic, interconnected whole and not each as lonely outposts.
(emphasis added)

[38] Justice Nallini Pathmanathan FCJ dissenting in *CTEB* had observed as follows:

B [228] Of importance and particular relevance in this case is also the rule that each of the fundamental constitutional principles is of equivalent importance and no one provision should be enforced so as to nullify or substantially prejudice or harm the other. As such, a construction should
C be adopted which has the effect of achieving a *harmonious interpretation* throughout, so as to protect and enforce the overall Constitution. This is a well-established rule [3] and the construction which achieves harmony should be preferred to an alternative interpretation which would give rise to uncertainty and conflict.

D *The FC Is An Organic And Evolving Instrument*

[229] A further adjunct to these general principles is that constitutional issues are not resolved by a mere reading of the meaning of the words without remembrance and acceptance that these matters are “living” or organic matters that are constantly evolving. *Some degree of consideration ought to be accorded to the line of growth of concepts in relation to the constitutional provisions, otherwise we would remain locked and fossilised in 1963, without regard to the evolution of concepts and progress from then to date.* The necessities of the present day and societal needs remain fundamental issues that cannot be simply ignored, while attention is accorded to the literal meaning of the words in question. In short, the provisions of the Constitution should be construed bearing in mind the founding principles and doctrines on which they were placed there, with due consideration given to progress, the nation’s needs and the all-important component of pragmatism.
(emphasis added)

[39] The Federal Court in *Dato’ Seri Ir Hj Mohammad Nizar Jamaluddin v. Dato’ Seri Dr Zambry Abdul Kadir; Attorney General (Intervener)* [2010] 2 CLJ 925; [2010] 2 MLJ 285 held that:

[26] *NS Bindra’s Interpretation of Statutes* (10th ed) at p 1295 speaks of two theories of interpretation of Constitution namely, the mechanical and organic theories. At p. 1296 it stated that organic theory is to be preferred. **‘The organic method requires us to see the present social conditions and interpret the Constitution in a manner so as to resolve the present difficulties’.** From the authorities cited above our courts are inclined to the organic theory in the interpretation of the Constitution.
(emphasis added)

[40] Finally, it is of equal importance that I also consider and stand guided by the general rules of interpretation of statutory provisions as held recently in *Tebin Mostapa v. Hulba-Danyal Balia & Anor* [2020] 7 CLJ 561 at pp. 575 to 576 (CLJ); at pp. 734 to 735 (MLJ). Justice Vernon Ong FCJ succinctly summarised as follows at pp. 581 (CLJ); at pp. 740 to 741 (MLJ):

[30] In our opinion, the rules governing statutory interpretation may be summarised as follows. *First, in construing a statute, effect must be given to the object and intent of the Legislature in enacting the statute.* Accordingly, the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. The court will not read words into a statute unless clear reason for it is to be found in the statute itself. Therefore, in construing any statute, the court will look at the words in the statute and apply the plain and ordinary meaning of the words in the statute. *Second, if, however the words employed are not clear, then the court may adopt the purposive approach in construing the meaning of the words used.* Section 17A of the Interpretation Acts 1948 and 1967 provides for a purposive approach in the interpretation of statutes. Therefore, where the words of a statute are unambiguous, plain and clear, they must be given their natural and ordinary meaning. The statute should be construed as a whole and the words used in a section must be given their plain grammatical meaning. It is not the province of the court to add or subtract any word; the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in the gaps disclosed. Even if the words in a statute may be ambiguous, the power and duty of the court ‘to travel outside them on a voyage of discovery are strictly limited’. *Third, the relevant provisions of an enactment must be read in accordance with the legislative purpose and applies especially where the literal meaning is clear and reflects the purposes of the enactment. This is done by reference to the words used in the provision; where it becomes necessary to consider every word in each section and give its widest significance.* An interpretation which would advance the object and purpose of the enactment must be the prime consideration of the court, so as to give full meaning and effect to it in the achievement to the declared objective. As such, in taking a purposive approach, the court is prepared to look at much extraneous materials that bears on the background against which the legislation was enacted. It follows that a statute has to be read in the correct context and that as such the court is permitted to read additional words into a statutory provision where clear reasons for doing so are to be found in the statute itself. (emphasis added)

Court’s Findings

[41] It was undisputed that the plaintiff was born in Malaysia after Malaysia Day, the first condition under art. 14(1)(b) has thus been duly satisfied by the plaintiff.

[42] The court will proceed to consider whether the plaintiff had satisfied the first qualification under Part II, s. 1(a) Second Schedule *ie*, ‘that every person born within the Federation of whose parents one at least is at the time of the birth either a citizen or permanently resident in the Federation’.

[43] On the face of s. 1(a) qualification, the plaintiff has also satisfied this criterion considering that the plaintiff is a person born within the Federation of whose parents one at least, being the father, is a Malaysian citizen at the time of her birth.

- A [44] However, it was the respondent's contention that in reading s. 1(a), this court must also consider and enforce Part III, s. 17 of the Second Schedule which reads; 'For the purposes of Part III of this Constitution references to a person's father or to his parent, or to one of his parents, are in relation to a person who is illegitimate to be construed as references to his
- B mother, and accordingly s. 19 of this Schedule shall not apply to such a person'. The respondent argued strongly that based on the majority decision of *CTEB* which held that by virtue of s. 17, an illegitimate child must follow the citizenship of the mother, and as such the plaintiff cannot be granted Malaysian citizenship.
- C [45] *CTEB* is distinguishable as it relates to an interpretation of s. 1(b) and not for s. 1(a), that legitimacy should be considered at the point of the originating summons application, and that where the court does not need to rely on an interpretation tool such as Part III, s. 17 it need not refer to it.
- D [46] The criteria under s. 1(a) clearly and literally states that so long as at least one of the parents of the plaintiff is a Malaysian, the plaintiff satisfies s. 1(a) which was supported by the High Court decision on 4 September 2019 wherein the plaintiff was declared as the legitimate child of Ong Chin Hock who is a Malaysian. The official DNA report dated 18 November 2019 by the Chemist Department further strengthen the plaintiff's case that Ong Chin
- E Hock and Luo Zhijuan are the biological father and mother of the plaintiff.
- F [47] Article 8 Federal Constitution guarantees a prohibition that there should be no discrimination, and all must be equally treated. The plaintiff's right of *jus sanguinis* vide her father must equally be recognised and carry some weight in law. It would be a breach of art. 8 for there to be a distinction drawn against (i) fathers and (ii) illegitimate children if s. 17 is applied to s. 1(a).
- G [48] Assuming I am wrong in my findings in respect of the qualification of the child under Part II, s. 1(a), it must next be considered if the child satisfies the criterion under s. 1(e). The child needs to only satisfies either one of this qualification before this court.
- H [49] In reading s. 1(e), it must also be noted that the following s. 2(3) classifies 'not born a citizen of any country' as 'For the purposes of para. (e) of s. 1 a person is to be treated as having at birth any citizenship which he acquires within one year afterwards by virtue of any provisions corresponding to para. (c) of that section or otherwise'.
- I [50] It is also argued that the plaintiff here is stateless, and her statelessness is not disputed or cannot be disputed by the respondents. Therefore, this court is urged to adopt the decision in *Madhuvita* where the applicant there was deemed to have no Papua New Guinean citizenship and thus entitled under s. 1(e) to have citizenship of Malaysia by law. It was held there that:

[75] On the strength of these two documents alone, we find difficulty in accepting the respondents' contentions that the appellant is a citizen of the Independent State of Papua New Guinea. That status is a question of mixed fact and law and there is insufficient evidence to come to that conclusion, particularly when the appellant's birth was undisputedly, never registered under the Citizenship Act 1975 (Chapter 12) of Papua New Guinea. Had there been a certificate to that effect issued under s. 5(4), the respondents' contentions would have a strong plausible basis. As it is, there is none and the suggestion that the appellant is thereby a citizen of Papua New Guinea is not one that the courts here should accept readily; more so on the particular facts in this appeal.

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[76] This is quite different from the position in *Pham v. Secretary of State for the Home Department* [2015] 3 All ER 1015, a case concerning the deprivation of citizenship; a status described by Lord Reed as one of "fundamental importance". At p. 1046, Lord Sumption dealt with the issue of Statelessness by considering whether the appellant there had Vietnamese citizenship at the time of his birth. Because the answer was in the affirmative, the Supreme Court concluded that the withdrawal of British nationality by the respondent did not render the appellant Stateless, a condition that would have contravened art. 1(1) of the Convention Relating to the Status of Stateless Persons 1954 (Cmd 9505).

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[77] Coming back to the present appeal, in support of her application, the appellant has shown that she is not a citizen of Papua New Guinea. The appellant's birth was not registered in Papua New Guinea. It was registered here instead. We agree with the submissions of learned counsel for the appellant that if the declaration sought is not given, if the appellant is not a citizen of the Federation, then she is Stateless. That State would not and cannot be said to be in the best interest and for the welfare of the appellant. Consequently, the appellant satisfies the terms of art. 14(1)(b) read with s. 1(e) of Part II of the Second Schedule to the Federal Constitution.

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[51] Firstly, the consideration point of s. 1(e) criteria is 'not born a citizen of any country' meaning the plaintiff must first have already attained the citizenship of another country at birth before the plaintiff cannot be entitled to qualify under s. 1(e).

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[52] Secondly, the Constitution has provided a deeming provision in s. 2(3) which says that a for a period of one year after the person's birth, any citizenship that person acquires would be the deemed citizenship at birth.

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[53] I find on an evaluation of the evidence and the position taken by parties in their submissions, both in written and oral form, that the plaintiff is stateless because she has no other citizenship apart from her classification as 'bukan warganegara' in her birth certificate.

[54] The plaintiff is born after Malaysia Day in Malaysia and has no other citizenship of any other country (after one year of her birth) and would automatically be entitled to citizenship by operation of law.

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- A [55] In the upshot, I find that the plaintiff has satisfied the qualification of Part II, s. 1(e) and ought to be entitled automatically by operation of law to be a Malaysian citizen. As is the case of the qualification under Part II, s. 1(a), since the plaintiff has satisfied the first criteria of art. 14(1)(b), a satisfaction of either one or both of the criteria in s. 1(a) or 1(e) would enable her to attain citizenship.
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Conclusion

- [56] Accordingly, I find that the plaintiff has made out a case for this court to declare order in terms of the originating summons, paras. 1 and 2, with no order as to cost.
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